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PP v. PRAKAS RAO KRISHNAN

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
AHMADI ASNAWI JCA
KAMARDIN HASHIM JCA
B [CRIMINAL APPEAL NO: J-05-174-06-2015]
6 APRIL 2016

CRIMINAL PROCEDURE: *Appeal – Appeal against acquittal and discharge – Appeal by prosecution – Drugs found in car driven by accused – Accused acquitted*
C *of two offences of trafficking but convicted for offence of possession – Whether accused had knowledge of drugs found in car – Allegation that accused drove car at behest of another person – Whether defence probable – Whether trial judge erred in acquitting and discharging accused when prima facie case was earlier found to infer accused had knowledge of drugs – Whether trial judge ought to have invoked*
D *presumption under s. 37(d) of Dangerous Drugs Act 1952*

The respondent was stopped by the police as he was driving exceeding the speed limit. The police officer on duty was suspicious of the respondent's demeanour as the latter shivered when asked to produce his driving licence and identity card. A search conducted on the car led to the discovery of
E substances in the boot and at the back passenger seat, which were later confirmed by the chemist to be 368.87g of heroin and 70.48g of monoacetylmorphine. The respondent was charged at the High Court for (i) two offences of trafficking ('the two trafficking charges') under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'); and (ii) the offence of
F possession ('the third charge'). At the end of the prosecution's case, relying on the fact that the drugs were found in the car driven by the respondent coupled with his conduct, the trial judge found the respondent had *mens rea* possession of the drugs. Satisfied that a *prima facie* case had been made out, the respondent was called to enter his defence. In his defence, the respondent
G (i) denied knowledge of the drugs; and (ii) stipulated that he was merely driving the car at the behest of one 'Boy'. After assessing the evidence of the defence's witnesses, the trial judge opined that 'Boy' was real and the actual trafficker of the drugs. At the conclusion of the trial, the trial judge acquitted and discharged the respondent of the two trafficking charges and sentenced
H him to four years imprisonment for the third charge. Hence, the present appeal by the prosecution against the acquittal of the respondent on the two trafficking charges. The prosecution submitted that (i) the trial judge erred in acquitting and discharging the respondent even though a *prima facie* case was earlier found by the trial judge to infer that the respondent had knowledge of the drugs in the car boot; (ii) it could not be assumed that 'Boy' testified
I by the defence's witnesses was the same 'Boy' who asked the respondent to drive the car; and (iii) the trial judge ought to have invoked the presumption under s. 37(d) of the DDA to find that the respondent was in possession of the drugs in the car boot.

Held (dismissing appeal; affirming order of High Court)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) The trial judge had evaluated and accepted the explanation of the respondent on his conduct. There was no error of fact or law which warranted appellate intervention. The evidence alluded to by the trial judge which had given rise to more than once inference was stated by the respondent in his defence. (paras 27 & 28)

(2) The trial judge could not be faulted in undertaking the approach of asking himself the question whether 'Boy' was a real person and whether 'Boy' was the real trafficker. This approach was correct in law. Furthermore, the finding of fact by the trial judge that 'Boy' was real and that 'Boy' could be the real trafficker was supported by the defence's witnesses. The finding was not perverse. (paras 29 & 30)

(3) The defence had raised a doubt on the prosecution's case. The trial judge had found direct or *mens rea* possession and trafficking under s. 2 of the DDA. The burden on the respondent was merely to cast a reasonable doubt on the prosecution's case which he had succeeded in doing. The prosecution's contention that the trial judge erred in not invoking the presumption of possession under s. 37(d) of the DDA was without merit. It was not incumbent upon the trial judge to invoke statutory presumption where there were sufficient facts and circumstances to establish actual possession cum knowledge. The order of acquittal and discharge was correctly made, especially given the fact that the car did not belong to the respondent. (paras 31-33)

Bahasa Malaysia *Headnotes*

Responden ditahan oleh pihak polis kerana memandu melebihi had laju. Pegawai polis bertugas curiga akan tingkah laku responden kerana responden menggigil apabila diminta mengemukakan lesen memandu dan kad pengenalannya. Pemeriksaan terhadap kereta tersebut menjumpai bahan-bahan dalam but dan tempat duduk penumpang belakang, yang kemudian disahkan oleh ahli kimia sebagai 368.87g heroin dan 70.48g monoacetylmorphine. Responden dipertuduh di Mahkamah Tinggi atas (i) dua kesalahan mengedar ('dua pertuduhan mengedar') di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'); dan (ii) satu kesalahan milikan ('pertuduhan ketiga'). Di hujung kes pihak pendakwaan, bersandar pada fakta bahawa dadah dijumpai dalam kereta yang dipandu oleh responden ditambah lagi dengan tingkah lakunya, hakim bicara mendapati bahawa responden mempunyai *mens rea* milikan dadah tersebut. Berpuas hati satu kes *prima facie* berjaya dibuktikan, responden dipanggil membela diri. Dalam pembelaannya, responden (i) menafikan pengetahuan tentang dadah tersebut; dan (ii) menyatakan bahawa dia hanya memandu kereta tersebut atas perintah seorang yang dikenali sebagai 'Boy'. Selepas menilai keterangan saksi-saksi pembelaan, hakim bicara berpendapat 'Boy' wujud dan adalah

A pengedar dadah yang sebenar. Pada penutup perbicaraan, hakim bicara membebaskan dan melepaskan responden daripada dua pertuduhan pengedaran dan menjatuhkan hukuman penjara empat tahun atasnya bagi pertuduhan ketiga. Oleh itu, pihak pendakwaan mengemukakan rayuan ini terhadap pembebasan responden daripada dua pertuduhan pengedaran. Pihak
B pendakwaan menghujahkan bahawa (i) hakim bicara terkhilaf dalam membebaskan dan melepaskan responden sedangkan hakim bicara membuat dapatan bahawa satu kes *prima facie* telah dibuktikan untuk menyimpulkan bahawa responden mempunyai pengetahuan tentang dadah dalam but kereta; (ii) 'Boy' dalam keterangan saksi-saksi pendakwaan tidak boleh dianggap
C sebagai 'Boy' yang sama yang mengarahkan responden memandu kereta itu; dan (iii) hakim bicara sepatutnya membangkitkan anggapan di bawah s. 37(d) ADB untuk memutuskan responden mempunyai milikan dadah dalam but kereta.

Diputuskan (menolak rayuan; mengesahkan perintah Mahkamah Tinggi)
D **Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:**

(1) Hakim bicara telah menilai dan menerima penjelasan responden tentang tingkah lakunya. Tiada kekhilafan fakta atau undang-undang yang mewajarkan campur tangan rayuan. Keterangan yang disentuh oleh
E hakim bicara yang membangkitkan lebih daripada satu inferens dinyatakan oleh responden dalam pembelaannya.

(2) Hakim bicara tidak boleh disalahkan dalam mengambil pendekatan bertanya pada diri beliau soalan sama ada 'Boy' wujud dan sama ada 'Boy' pengedar sebenar. Pendekatan ini betul di bawah undang-undang.
F Tambahan lagi, dapatan fakta oleh hakim bicara bahawa 'Boy' wujud dan bahawa 'Boy' mungkin pengedar sebenar disokong oleh saksi-saksi pembelaan. Dapatan itu tidak bertentangan.

(3) Pembelaan berjaya menimbulkan keraguan pada kes pihak pendakwaan. Hakim bicara mendapati *mens rea* milikan dan pengedaran di bawah
G s. 2 ADB. Beban responden hanya sekadar menimbulkan keraguan pada kes pihak pendakwaan dan ini berjaya dilakukannya. Hujahan pihak pendakwaan bahawa hakim bicara terkhilaf kerana tidak membangkitkan anggapan milikan di bawah s. 37(d) ADB tidak bermerit. Hakim bicara tidak berkewajipan membangkitkan anggapan
H statutori jika cukup fakta dan hal keadaan untuk membuktikan milikan merangkap pengetahuan. Perintah pembebasan dan pelepasan dibuat dengan betul, apatah lagi kerana kereta tersebut bukan milik responden.

Case(s) referred to:
Emmanuel Yaw Teiku v. PP [2006] 3 CLJ 597 FC ***(refd)***
I *Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC* ***(refd)***
Mohd Zaiham Mislan v. PP [2010] 1 CLJ 1 FC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), First Schedule

For the appellant - Mangaiarkarasi Krishnan; DPP
For the respondent - Hisham Teh Poh Teik; M/s Teh Poh Teik & Co
- Muhammad Abd Kadir; M/s Muhammad Abd Kadir & Co

[Editor's note: Appeal from High Court, Johor Bahru; Criminal Trial No: 45A-43-11-2013 (affirming).]

Reported by Najib Tamby

JUDGMENT

Tengku Maimun Tuan Mat JCA:

Background

[1] The respondent was tried in the High Court for two offences of trafficking. The charges read:

> The first charge
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> Bahawa kamu pada 15.7.2013 jam lebih kurang 10.10 malam di dalam sebuah kereta jenis Subaru Impreza no. pendaftaran SDQ 9019 M bertempat di KM41, Lebuhraya Utara Selatan menghala ke arah Johor Bahru, Johor, di dalam daerah Kulaijaya, di dalam negeri Johor telah didapati mengedar dadah berbahaya jenis Heroin berat bersih 368.87 gram. Dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.
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> The second charge
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> Bahawa kamu pada 15.7.2013, jam lebih kurang 10.10 malam di dalam sebuah kereta jenis Subaru Impreza no. pendaftaran SDQ 9019 M bertempat di KM41, Lebuhraya Kulaijaya di dalam negeri Johor, telah didapati mengedar dadah berbahaya jenis Monoacetylmorphine berat bersih 70.48 gram. Dengan itu, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The respondent was also charged for being in possession of 1.58g of methamphetamine (the third charge), in respect of the same place and time.

[3] At the conclusion of the trial, the High Court acquitted and discharged the respondent of the two trafficking charges and sentenced the respondent to four years imprisonment with effect from the date of arrest for the third charge.

[4] This is the prosecution's appeal against the acquittal of the respondent on the trafficking charges.

A **The Prosecution's Case**

[5] On 15 July 2013, L/Kpl Mohamad Akram bin Ahmad Mahayudin (SP2) and his colleagues were at KM 41, Lebuhraya Utara-Selatan, District of Kulaijaya to apprehend motor vehicles which had violated the speed limit.

B **[6]** At about 10.10pm, the Subaru Impreza (the car) driven by the respondent was stopped as it had travelled at 138 km per hour, exceeding the limit of 110 km per hour. The respondent was the sole occupant of the car. SP2 asked for the respondent's driving licence and identity card. The respondent shivered when he handed them over. SP2 was suspicious of the behaviour of the respondent. The respondent was asked to get down from the C car. The respondent refused and offered SP2 RM100 to settle the matter.

[7] SP2 then seized the ignition keys to the car and ordered the respondent out of the car to open the boot. The respondent was reluctant. The respondent instead offered SP2 RM500. When the boot of the car was finally D opened, SP2 saw a bag with the word 'KITA' on it (exh. P14A). The respondent was asked to unzip it. 15 transparent plastic packets of whitish powdery and granular substances suspected to be dangerous drugs were found inside the bag.

[8] Inspector Syed Zainal Abidin bin Syed Ali (SP6), an officer with the E Narcotics Branch arrived at the scene and took charge of the arrest of the respondent. SP6 conducted an interior search of the car. At the back passenger seat, he found a container with the words 'ECLIPSE MINTS' printed on it. Inside the container were seven plastic packets containing crystal like substances. Beside the container was a bag which contained the F respondent's clothes.

[9] The substance found in bag 'KITA' and container 'ECLIPSE MINT' was sent for analysis. The chemist, Siti Zubaidah binti Hanapi (SP3) confirmed that the substance found in the bag 'KITA' was heroin and monoacetylmorphine weighing 368.87g and 70.48g respectively which form G the subject matter of the first two trafficking charges. SP3 also confirmed the substance in container 'ECLIPSE MINT' to be methamphetamine weighing 1.58g, the subject matter of the third charge. Heroin, monoacetylmorphine and methamphetamine are listed as dangerous drugs in the First Schedule of the Dangerous Drugs Act 1952 (the Act).

H **[10]** Investigation by Inspector Norashikin binti Nordin (SP8) disclosed that the plate number of car was fake, the engine number was non-existent and that the car had been reclassified as 'de-registered' and taken out from the registration system of the Land and Transport Authority Singapore since November 2007.

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Findings At The End Of The Prosecution's Case

[11] In determining the issue of possession, the learned trial judge applied the principles in *PP v. Denish Madhavan* [2009] 2 CLJ 209 and *Leow Nghee Lim v. Regina* [1955] 1 LNS 53; [1956] 22 MLJ 28 to find that the respondent had custody and control of the car and that the respondent had full control such as not to allow anyone else access to the items found in the car.

[12] The learned trial judge further found that the respondent knew of the drugs found in the car. An inference of knowledge was drawn by the learned trial judge from the conduct of the respondent who was shivering when asked by SP2 for his driving licence and identity card and from his attempt to bribe SP2. *Parlan Dadeh v. PP* [2009] 1 CLJ 717; *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597 and *Mohd Zaiham Mislan v. PP* [2010] 1 CLJ 1; [2009] 6 MLJ 737 among others, were cited in support of the finding on knowledge.

[13] As for the element of trafficking, the learned trial judge found that the act of the respondent in transporting the drugs inside the car amounts to trafficking under s. 2 of the Act. Having found that the prosecution had made out a *prima facie* case, the respondent was called upon to enter his defence.

The Defence

[14] In his evidence given under oath, the respondent stated that he had no knowledge of the presence of drugs in the boot of the car as he was merely driving the car from Penang to Johor Bahru at the behest of one 'Boy'. The respondent owed 'Boy' RM4000 and in consideration of the respondent driving the car to Johor Bahru, Boy agreed to release the respondent of his debt. In essence the defence of the respondent was that the actual trafficker was 'Boy'.

[15] The respondent called other witnesses to support his defence. Govindarkumar a/l Anandan (SD2) testified as to the fact that he fetched the respondent on his motorcycle and he sent the respondent to the parking area of TESCO at Seberang Perai. The evidence of SD2 revealed that the respondent brought with him a bluish black bag. SD2 identified the bag brought by the respondent as exh. P76, which was found at the backseat of the car.

[16] Gopal a/l Kandiah (SD3) gave evidence that he was requested by the respondent to look for 'Boy'. SD3 was informed that 'Boy' would usually be at Starbucks Cafe near Pacific at Perai. SD3 went to Starbucks Cafe. The employees at Starbucks told SD3 that 'Boy' was a gangster and SD3 was advised not to look for 'Boy' for the sake of SD3's safety.

[17] An officer attached to the Narcotics Branch, IPD Seberang Perai Tengah, Inspector Mohd Hafiz bin Ahmad (SD4) confirmed the existence of an Indian man called 'Boy' in Seberang Perai. According to SD4, from the information received from suspects and arrestees in drugs operation, 'Boy' is a drug trafficker in the area of Seberang Perai Tengah.

A **Findings At The Close Of The Defence Case**

[18] Applying Radhi direction, the learned trial judge asked himself the question whether 'Boy' was a real person. Having assessed the evidence of SD3 and SD4, the learned trial judge found that 'Boy' was real.

B **[19]** The learned trial judge proceeded to ask whether 'Boy' could be the real trafficker as contended by the respondent. In this regard, the learned trial judge evaluated the evidence of SD2 who had stated that he saw the respondent bringing only one bag, exh. P76 to the parking area at TESCO. The learned trial judge also considered the evidence of SD4 who had confirmed that 'Boy' was active in drug activities in the Seberang Perai area.

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[20] The learned trial judge was satisfied that 'Boy' was the actual trafficker of the drugs found in the boot of the car. Premised on the above, it was the finding of the learned trial judge that the respondent had raised a reasonable doubt on the prosecution's case. The respondent was thus acquitted and

D discharged.

The Appeal

[21] Learned DPP raised the following grounds of appeal:

(i) that the learned trial judge erred in changing his finding on knowledge;

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(ii) that the learned trial judge erred in accepting the defence of 'Boy'; and

(iii) that the learned trial judge erred in not invoking s. 37(d) of the Act.

[22] It was the contention of learned DPP that the learned trial judge erred in making a-360 degrees turn in acquitting and discharging the respondent at

F the end of the defence case when a *prima face* case was earlier found by the learned trial judge to have been established based on the same set of facts before him. In particular, learned DPP emphasised the finding of the learned trial judge on the conduct of the respondent to infer that the respondent had knowledge of the drugs in the boot.

G **[23]** On the defence, learned DPP submitted that there was no proper description of 'Boy' given to the police and it cannot be assumed that 'Boy' as testified by SD4 is the same person as 'Boy' who had asked the respondent to drive the car to Johor Bahru.

H **[24]** In urging that the appeal be allowed, learned DPP further submitted that the learned trial judge ought to have invoked the presumption under s. 37(d) of the Act to find that the respondent was in possession of the drugs in the boot. Applying s. 2 for the element of trafficking, learned DPP argued that the prosecution would have proved its case against the respondent.

I

Our Findings

[25] At the end of the prosecution's case, the learned trial judge relied on the facts that the drugs were found in the car driven by the respondent, coupled with the conduct of the respondent to find that the respondent had *mens rea* possession of the drugs in the car and applied s. 2 of the Act, to find that a *prima facie* case has been made out.

[26] Having heard the defence, the learned trial judge however found that several inferences favourable to the respondent could be drawn from the conduct.

[27] In our view, the issue of the learned trial judge making a-360 degrees turn did not arise. The learned trial judge had evaluated and accepted the explanation of the respondent on his conduct, in making the following findings:

> Akhir sekali Mahkamah ini juga ingin menganalisa sedikit terperinci mengenai keadaan OKT yang dikatakan terketar-ketar ketika menyerahkan lesen memandu serta kad pengenalan dirinya pada SP2 dan diikuti dengan dua (2) kali tawaran wang suapan berjumlah RM200.00 dan RM500.00 ketika beliau diminta keluar dari kereta serta kemudiannya apabila diminta membuka 'boot' belakang kereta tersebut.
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> ... terdapat juga keterangan-keterangan yang ... berpihak atau menyokong pembelaan seperti disenaraikan dibawah berikut:
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> (i) OKT sedar telah melakukan kesalahan memandu melebihi had laju pada 138 km/jam dalam kawasan 10 (*sic*) km/jam.
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> (ii) OKT sedar memandu kereta Subaru Impreza (Ekshibit P64) menggunakan cukai jalan yang telah tamat tempoh sahlakunya.
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> (iii) OKT sedar dan mengaku beg warna hitam biru jenama 'Gazelle' (Ekshibit P76) didalamnya terdapat satu (1) bekas tin tertulis 'eclipse' mengandungi dadah berbahaya Methamphetamine seberat 1.58 gram adalah kepunyaannya terletak di atas kerusi penumpang belakang kereta (Ekshibit P64) yang dipandunya sendiri.
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> (iv) ...
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> (v) ...
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> (vi) ...
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> (vii) ...
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> Keterangan-keterangan diatas yang pada mulanya dizahirkan oleh saksi-saksi pendakwaan dan kemudian disahkan kebenarannya oleh saksi-saksi pembelaan pula telah menimbulkan atau membenarkan lebih dari satu inferen menyebabkan perlakuan aneh OKT terketar-ketar tersebut dan dalam keadaan sedemikian wajarlah dirujuk kepada prinsip yang diputuskan dalam kes *Aklianasyah v. Public Prosecutor* (Criminal Appeal No. N-05-289-11/2002 dipetik di bawah berikut:

A ... it is trite law when two or more than one inferences can be made from a set of facts against the accused person, the court should draw the one most favourable to him ...

Tanpa elemen pengetahuan tentang dadah-dadah berbahaya berada di dalam 'boot' kereta mana mungkin OKT dikatakan juga mengedar ('trafficking') dadah tersebut sepertimana dihendaki di bawah elemen B ketiga kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952.

[28] We agreed with the above finding of the learned trial judge and we found no error of fact or law which warrants our appellate intervention. The evidence alluded to by the learned trial judge which had given rise to more C than one inference was stated by the respondent in his defence (see p. 0187: Appeal Record Vol. 2).

[29] Further, we were of the view that the learned trial judge could not be faulted in undertaking the approach of asking himself the question whether 'Boy' was a real person and whether 'Boy' was the real trafficker. That D approach was correct in law. We reproduce that part of the judgment of the learned trial judge with which we found no reason to disturb:

Diperingkat awal lagi semasa OKT disoal siasat SP8 telahpun dimaklumkan oleh OKT bahawa beliau memandu kereta Subaru Impreza nombor pendaftaran Singapura SDQ 9019M (Ekshibit P64) dari Pasaraya E Tesco Seberang Perai, Pulau Pinang ke Terminal Larkin, Johor Bahru, Johor sebenarnya oleh seorang rakan berbangsa India panggilannya 'Boy' untuk diserahkan kereta tersebut kepada rakannya di sana dengan balasan upah dikontrakan semua hutang OKT berjumlah RM4000.00 dikira selesai sepenuhnya. Dalam keadaan sedemikian Mahkamah akur dengan prinsip yang diputuskan oleh Mahkamah Rayuan dalam kes *Yee Wen Chin v. PP* F *& Another Appeal* [2008] 6 CLJ 773 dipetikan di bawah berikut:

[12] ... In the course of cross-examining the prosecution witnesses it was extracted from PW5 that the information he had received was that Woo Kok Meng was trafficking in drugs at the place in question. The defence quite properly took advantage of this fact G to demonstrate that Woo was the real trafficker and that the accused was entirely innocent. The accused was clearly entitled to do this in view of the decision in *Mohamad Radhi v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC. That case is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was H a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then I determine whether that other person is the real trafficker. This is called the *Radhi* direction and must be administered by a court unto itself when such a defence is taken. See, *Sochima Okoye v. Public Prosecutor* [1995] 3 CLJ 371 CA.

[30] The finding of fact by the learned trial judge that 'Boy' was real and that 'Boy' could be the real trafficker was supported by the evidence of SD3 and SD4. The finding was not perverse.

[31] On the totality of the evidence, we agreed with the learned trial judge that the defence had raised a doubt on the prosecution's case. The learned trial judge had found direct or *mens rea* possession and trafficking under s. 2 of the Act. The burden on the respondent is merely to cast a reasonable doubt on the prosecution's case which in our judgment, the respondent had succeeded in doing so.

[32] Learned DPP's argument that the learned trial judge erred in not invoking the presumption of possession under s. 37(d) of the Act is without merit. It was not incumbent upon the learned trial judge to invoke the statutory presumption where there were sufficient facts and circumstances to establish actual possession cum knowledge (see *Emmanuel Yaw Teiku v. PP* (*supra*)).

[33] To conclude, we found that the order of acquittal and discharge was correctly made, especially given the fact that the car does not belong to the respondent. We therefore unanimously dismissed the appeal by the prosecution. The order of the High Court was affirmed.